SSHB 1651 Administrative Sealing of Juvenile Records – Issues[1]

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The law took effect on June 12, 2014. Your county juvenile court should have the process in motion at this time. Here are some issues and possible solutions to consider:

THE PROCESS

1) **How Does the Court Get the Process Started?** – **Work together:** You need to get together with your juvenile court judge(s), your JCA, and clerks to decide how this process will work in your local county.

   a. **How Frequent Must the Court Hold Sealing Hearings?** – **Depends on local practice:** The bill doesn't require individual hearings be set for each juvenile. It says the juvenile court shall hold "regular sealing hearings" and requires a case be set for the next regular hearing starting at the juvenile's 18th birthday, or beyond if there is supervision or parole past 18. The bill does not say how often these administrative hearings must be. The frequency should somewhat depend on your annual filed caseloads. Most counties will do these weekly or monthly depending on the caseloads they face.

   b. **Are State Forms Available for this Process?** – **Yes.** There are state forms but be aware they are very general and may need tweaking for your local practice.

      i. **What Form Sets the Hearing? – Disposition order w/clerk's action:** The state form order on disposition informs the juvenile about the administrative hearing, whether he or she qualifies, and sets the date of the hearing, noting it as a clerk's action. If your local juvenile clerk does not set these hearings on a court schedule based on the disposition, but instead, you have a court scheduler or someone else do this without using the disposition order, you will need to create a separate setting order for the administrative hearing.

      ii. **What Form Seals the Case? – Sealing order:** The state form sealing order is now all-inclusive for sealing under motions, auto-deferred (13.40.127), the new administrative sealing, and, GR15. The form includes both a grant and denial of the sealing. Of course the state form can be substituted with a similar form created for your local county practice.

[1] This is not legal advice. The issues and opinions expressed herein are those of the author and are based on a rational interpretation of the new sealing law and the intent of the Legislature in enacting it.

c. **<u>Who Does the Paperwork?</u>** – **Probably the deputy prosecutor:** Nothing in the bill says the prosecutor or JCA is supposed to do anything in regards to administrative sealing, it says the court shall set and hold "regular" administrative sealing hearings; however, county prosecutors are in the best position to provide appearance and filling out of orders where necessary, beginning with setting the administrative sealing hearing at disposition and later filling out orders at the sealing hearing. JCA's, probation staff, and clerks should be prepared to appear at the sealing hearing and advise the prosecutor and court of any pending violations and/or restitution owing, or other issues impeding administrative sealing.

2) **<u>When Does the Administrative Hearing Get Set?</u>** – **At the disposition of a case:** At the disposition of a juvenile offender matter, the court must set an administrative hearing for the next regular sealing hearing after the latest of either the juvenile's 18th birthday, the end of supervision, or, if committed to JRA (JJ&RA), then release from the commitment including any parole. Before determining the date of the hearing, you must first determine if the juvenile qualifies for administrative sealing.

a. **<u>Are Some Dispositions Disqualified?</u> - Yes:** Cases excluded from administrative sealing include all dispositions where one or more offenses in the disposition constitute a "most serious offense as defined by RCW 9.94A.030", a "sex offense under RCW 9A.44", or, a "drug offense as defined by RCW 9.94A.030" (basically any felony under RCW 69.50, except felony possession under RCW 69.50.4013 or forged prescription under RCW 69.50.403).

i. **<u>Do You Set a Sealing Hearing if Disposition is Disqualified?</u>** - **No:** The literal language of the statute indicates you set a sealing hearing at every disposition, and then at the sealing hearing, you seal the case unless one of the offenses at disposition is a disqualified offense. Such a literal interpretation ends up in a senseless hearing and a waste of court, JCA, clerk, and prosecutor time. In interpreting a statute, the inherent power of the court is available to effectuate the efficient administration of justice through procedural rules. See, *State v. Wadsworth*, 139 Wn.2d 724, 740-41, 991 P.2d 80 (2000). Therefore, for disqualified offense dispositions a court should effectuate the efficient administration of justice by not setting an administrative sealing hearing where one of the disposition offenses is not qualified. The juvenile is not prejudiced by the lack of a hearing because in most cases there is an opportunity to seal by motion under Title 13.50.

ii. **<u>Does "Sex Offense" Include All Registration Offenses?</u>** – **Yes:** A "sex offense under RCW 9A.44" logically includes the definition of "sex offense" for purposes of sex offender registration in RCW 9A.44.128, which refers to and makes a "sex offense" broader than just offenses under Title 9.44. RCW 9A.44.128 includes a number of other offenses, including sex offenses defined in RCW 9.94A.030. Some might argue the legislature's use of the word "under" instead of "defined" is an

indication only offenses listed in Title 9.44 qualify; however, it is unlikely the Legislature intended to seal any case requiring sex offender community notification where sealing by motion under Title 13.50 already requires waiver of the registration requirement. Sealing will not remove the registration requirement and records are not confidential for the purposes of community notification. Finally, the definition of "sex offense" in RCW 9.44.128 are "under Title 9A.44" so they logically need to be included in the overall assessment of disqualified crimes for administrative sealing.

iii. **Will Disqualified Offense History Prevent Other Administrative Sealing? – No:** The language of the statute indicates the court shall enter a sealing order unless one of the offenses for which the court has "*entered a disposition*" is not a disqualified offense. Some might argue any criminal history involving a disqualified offense will prevent all record sealing for other dispositions otherwise qualified, but this is not the case. First, the language of the administrative sealing statute does not use the words "criminal history" involving a disqualified offense, which would have been a simple clarification to make had the drafters intended to disqualify all administrative sealing. In fact, the final bill report mentions "*the disposition"* not being for a disqualified offense. Second, the original intent of the bill was to make all juvenile records confidential unless the record involved one of the disqualified offenses. This means other dispositions involving qualified offenses would not be available to the public, so the original intent of the bill would support administrative sealing of any non-disqualified offense even if there is a history of disqualification.

b. **Is the Law Retroactive to Older Cases? - No:** The intent of the bill is to cover all dispositions on or after June 12, 2014, regardless of the date of commission (crimes committed before June 12, 2014). It does not appear the Legislature intended retroactive application. All dispositions prior to June 12, 2014 can still be sealed under existing provisions of RCW 13.50.050 (to be re-codified).

c. **What Date if the Juvenile is Subject to JJ&RA Post 18? – Maximum + 6 months**: Most administrative hearings at disposition will be set on a date shortly after the kid's 18th birthday. If supervision will go beyond 18, the court will calculate a date for the regular sealing hearing after supervision, which is calculated at disposition. For JRA (now JJ&RA) commitment cases where the "anticipated" release is likely after age 18, there be an issue with calculating the hearing date since commitment and parole is based on a determination by JJ&RA post disposition. First, the commitment is based on a minimum and maximum in the range. Second, parole services are determined by JJ&RA based on a risk assessment, with the possibility parole is not imposed. These risk assessments are normally done after the court orders the commitment range. For purposes of setting the administrative hearing date the court should use the maximum number in the range as the anticipated date of release, then, since non-sex offense cases never get more than six months of parole, an additional six months added to the

maximum commitment. If the juvenile is released from commitment and/or parole earlier than anticipated, they can request an acceleration of the hearing, or do nothing. There is no prejudice either way because a sealing hearing will be held at some point.

THE SEALING HEARING

1) **Does the Juvenile Need to Be Present at the Administrative Sealing? – No.** There is no requirement for the juvenile to be present at the initial administrative hearing. However, if there is an objection or the court notes a compelling reason not to seal, the juvenile must be given notice and an opportunity to be present at a contested hearing later (discussed below).

2) **Does the Case get Automatically Sealed at the Administrative Hearing? – No**: At the sealing hearing the court still makes a determination as to whether the case qualifies for sealing then. One should therefore use the term "administratively" seal rather than "automatically" seal.

   a. **Is There a Condition to Sealing? – Yes, completion of disposition**: By the time of the administrative hearing, the juvenile must have completed the terms and conditions of disposition, including affirmative conditions and financial obligations, which is going to include payment of restitution.

      i. **Is an Objection to Sealing Required For Failing the Condition? – No**: There is nothing requiring an objection to the sealing if the court can take judicial notice of the fact the juvenile did not complete the terms and conditions of the disposition. In most cases, a filed violation pending resolution, or, clerk notation of financial obligations still owing should be sufficient. If the court takes judicial notice of either, an order striking the hearing without objection can be entered as administrative sealing is not appropriate under the statute.

      ii. **Is a Pending Violation, Warrant, or Unpaid Restitution Contemplated? – Yes**: In general, at the time of the administrative hearing, the court can take judicial notice of any pending unresolved probation violation, warrant, or unpaid restitution establishing the juvenile did not complete the terms and conditions of probation. However there may be two remaining issues in this context.

         (1) **Prior Resolved Violations Contemplated? – No:** There may be cases where the juvenile had prior probation violations which resolved before the administrative hearing. The statute does not say "successful" completion of supervision, so the fact the juvenile had prior resolved probation violations should not impede sealing of the case, unless an objection is brought, in which case the court can have a contested hearing on the objection.

(2) **<u>Existing Violations but No Pending Modification or Warrant?</u> – No**: There may be cases where the juvenile failed to complete an affirmative condition, like community restitution hours for instance, but no violation was ever brought prior to the end of supervision. It could be argued the juvenile failed to complete the terms and conditions of the disposition order; however, keep in mind the juvenile court has lost jurisdiction to find and modify the disposition once supervision ends without a pending violation being filed. See, *State v. May*, 80 Wn. App. 711, 716-17, 911 P.2d 399 (1996). While this doesn't prevent a court from finding sealing inappropriate after an objection and contested hearing, it won't serve as a basis for judicial notice. Based on *May* it can be presumed the conditions of probation are complete as long as no violation or warrant for the same remains pending in the case. Of course jurisdiction for unpaid restitution and other financial obligations can remain regardless of a pending violation. RCW 13.40.190 & .192.

b. <u>Can Anyone Object at the Administrative Sealing?</u> – Yes: The statute contemplates the court sealing the case unless there is an objection to seal, including the court's own finding of a compelling reason not to seal, in which case a contested hearing must be scheduled.

i. **<u>Are There any Requirements for Objection?</u> – No:** The statute just says the court shall seal unless it receives an objection to sealing or otherwise notes a compelling reason not to seal. There is no express limitation on who can object, including the prosecutor and/or JCA. There is no indication as to a time requirement for issuing an objection prior to sealing, nor any requirement as to appearance or whether the objection may be written. There is also nothing to indicate whether the objection must state specific reasons to each case, or, whether there can be a "blanket" objection, i.e., a general objection to sealing all cases qualified for administrative sealing. In this regard there are no clear answers. As such, your county's local practice will dictate the requirements for valid objection, but there is certainly both statutory and legal authority to support individualized findings for each case based on merits and not some general blanket objection.

ii. **<u>What Notice is Necessary for the Contested Hearing?</u> – At least 18 days**: The statute says the court shall set a contested hearing and the juvenile and his or her counsel shall be given at least 18 days notice of the contested hearing. There is nothing in the statute to indicate what the court can do if there is no proof of notice. Remember the juvenile does not have to appear at the initial sealing hearing, and, unless there is notice and opportunity to be heard, the court may technically have no other option than to seal the case. Some of these administrative sealing hearings will be held months, even years, past disposition, at a time where the juvenile's whereabouts are likely unknown.

iii. **<u>What About Representation at a Contested Hearing?</u> – Opportunity to respond**: The statute says if there is a contested hearing then the respondent and "his or her attorney shall be given at least eighteen days' notice of any contested sealing hearing and the opportunity to respond to any objections, but the respondent's presence is not required at any sealing hearing." So if there is a contested hearing the only requirement is notification to the attorney, presumably the attorney who represented the juvenile at disposition. Nothing says the respondent is entitled to a new attorney, nor to representation at the contested hearing.

c. **<u>Should the Administrative Hearing Be Continued?</u> - No:** At the scheduled hearing, there may be requests to continue the administrative sealing because the juvenile could complete the terms of the disposition. These motions to continue may come because the kid is "almost" done paying restitution, or, "just needs a few more hours of community restitution" to take care of a filed violation. In this instance it is recommended the court strike the administrative hearing and allow the juvenile to bring a motion to seal under Title 13.50. The rationale for not continuing the administrative sealing is two fold. First, the statute should be intended to incentivize completion of the disposition order by the time the administrative hearing is held. If the Legislature had intended continuances, they would have said so in the statute. Second, the court should effectuate the efficient administration of justice and not continue hearings where there is only the possibility the disposition will be complete. If the court continues one hearing, then precedent is set for all others along with multiple continuances if requested. Finally, striking the hearing creates no material prejudice to the juvenile, who can always motion the court for sealing later. Therefore it is recommended the hearing be stricken and not continued.

d. **<u>What is the "Scope" of the Administrative Sealing Order?</u> – Same as motions:** Section 4 of the new act designates sealing through both the administrative sealing process, as well as the current motions practice for sealing any file not already sealed administratively. The current sealing by court motion continues logically due to the fact administrative sealing has no retroactive application to older cases. In addition, even some prospective cases will be ineligible for administrative sealing though still remaining eligible for sealing later by motion. Thus, the two pronged sealing methods, both administrative and by motion, properly co-exist in the same statute. The scope of sealing under each method should be interpreted as having the same effect. That is, there should be no difference in the effect of sealing by administrative order as under current motion practice.

While the administrative sealing and sealing by motion remain in separate sections, they both indicate the scope of the sealing as affecting "juvenile court records." The Legislature intended on sealing a "juvenile court record" whether the "official juvenile court file" or any other "record" held by a juvenile justice or care agency, regardless of method. Such is the only reasonable interpretation of the intent provision in SSHB 1651 as well as the word "records" defined by the statute as "the official juvenile court file,

the social file, and records of any other juvenile justice or care agency in the case." Section 4, related to both sealing by administrative order as well as motion, "governs records relating to the commission of juvenile offenses, including records relating to diversions." Section 4 also states: "If the court enters a written order sealing the juvenile court record pursuant to this section, it shall, subject to RCW 13.50.050(13), order sealed the official juvenile court record, the social file, and other records relating to the case as are named in the order. Thereafter, the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual." Finally, a unified scope of sealing is consistent with the minimum age of 18 to qualify, that is the point at which a juvenile ages out of the system and must move forward in the community to get housing and other important life necessities, as stated in the legislative intent of the new law.

OTHER CONCERNS

1) **Is there Immediate Sealing of any Acquittal or Dismissal of Charges? – Yes:** The statute now requires immediate sealing of a case whenever there is an acquittal after a fact finding, or, upon dismissal of charges. Keep in mind sealing of the case is only required upon dismissal of the *charges* as opposed to the case or cause number filed with the court.

   a. **Does This Include Dismissals in Favor of Diversion? – No:** Remember the sealing is needed only if *charges* are dismissed with no further action to be taken. If the case cause number is dismissed and referred to diversion, the *charges* are not technically dismissed. Instead the *charges* remain, are referred to a diversion unit, and, upon entering a diversion agreement will constitute the juvenile's criminal history. RCW 13.40.020. In addition, if you seal a dismissal in favor of sending the charges to diversion, there is no record upon which to divert the case, as all juvenile justice agency's are required to seal the matter. This is certainly not something intended by the Legislature as the dismissal language addresses *acquittal* of charges, where the case essentially becomes non-conviction data. If the case is dismissed later on as a "completed diversion" the same logic for not sealing the case would apply as the diversion remains criminal history and must be known so as not to require further mandatory diversions. Finally, there are ways to actually destroy a diversion record later, with some diversions subject to automatic destruction. Sealing the diversion will effectively prevent the destruction and cause further confusion for the record keeper.

   b. **Does This Include Dismissals After Successful Completion of Deferred? – No:** Successful deferred dispositions are automatically sealed under a different provision in RCW 13.40.127, requiring mandatory automatic sealing of those dispositions within 30 days of the juvenile's 18th birthday.

c. **<u>Does This Include Dismissals After Successful Completion of Treatment Court?</u> – Yes:** Because successful treatment court requires dismissal of the charges in a case, there will need to be an immediate order sealing the case unless the juvenile agreed as part of the treatment court contract to waive any mandatory sealing. Prosecutors will want to be cautious sealing any case where there was successful completion and dismissal pursuant to a treatment court contract because once sealed the case and treatment court disposition does not technically exist, leaving open the possibility the juvenile would qualify again for treatment court. One suggestion would be to make waiver of immediate sealing a condition of the contract but indicate the case will be sealed at dismissal if the dismissal occurs on or after the 18th birthday, otherwise sealed at the next regularly scheduled sealing hearing after turning 18 in which case consideration for the waiver is participation and eventual sealing.

2) **<u>What About Collateral Consequences?</u> – They remain unless terminated:** Even if a case is sealed, other collateral consequences will remain unless the court terminates those consequences. For instance, any felony firearm registration, DV no contact order, or stalking no contact orders will remain in effect until terminated by a court. This also includes any prohibitions on possessing a firearm that result from a conviction.

3) **<u>Does Administrative Sealing Restore the Firearm Right?</u> – No:** Sealing a case does not entitle anyone to an order of restoration and does not restore a person's right to possess firearms previously lost in the case. This is true whether the case is sealed by motion, automatic sealing of deferred disposition, or sealing by administrative hearing. There is no statutory authority for entering an order of restoration simply because a case is sealed. RCW 9.41.040(3) talks about a person not being precluded from possession if the conviction has been the subject of a "pardon, annulment, certificate of rehabilitation or other equivalent procedure". Sealing is not tantamount to a certificate of rehabilitation or equivalent procedure under RCW 9.41.040(3). See, *Nelson v. State*, 120 Wn. App. 470, 478-79 85 P.3d 912. However, according to *Nelson*, once sealed and expunged, there is no longer a conviction or other information to prevent a person from possessing a firearm either. *Id*; See also, RCW 9.41.040(3)["*Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge"* Id.]. So functionally, the sealed case can no longer be the basis for a charge of UPFA later.

4) **<u>What About Supervision Transfers to Other Counties?</u> – Subject to sealing by motion:** Nothing in the administrative sealing statute requires an administrative sealing hearing be set up in other counties for cases transferred to those counties for supervision. The only administrative sealing hearing required is for the court imposing a disposition. If a case is thereafter transferred to a different county for supervision and a separate cause number is assigned to the supervision case that case number is not subject to the same administrative sealing as the original disposition court case number. For the supervision case, that file and the records therein must be sealed by standard motion in Title 13.50.